with the Congressionally mandated standard,[2] what follows in the body of this Response demonstrates that the ultimate entitlement of the third-party interest is a minimum of at least an approximate $3.00 per Mcf of helium under ordinary principles of restitution and quasi-contract. The $3.00 figure is not found, as such, in the processing contracts, but the approximate $3.00 amount is identified and specified as a percentage of a particularized part of the initial base contract price, and when that percentage is so applied, the $3.00 figure is an exact amount to which the landowner-lessors and producer-lessees are entitled as the third-party beneficiaries mentioned in the processing contracts.

It is apparent from the nature of the contracts and cannot be disputed that if the third-party helium interest is ultimately determined to have a value of more than the approximate $3.00 per Mcf amount specified to be paid by the processing contractor to third-parties, the landowners and the lessee-producers, who have now been identified as those third-parties, are entitled to be paid at least that $3.00 amount, strictly as third-party beneficiaries.

But, in theory at least, the interests of the third-parties could ultimately be determined to have a value less than $3.00 per Mcf of helium. It is the position of responding landowners that, even in that event, under established principles of restitution and quasi-contract, as a matter of law, the Helex Group will be unjustly enriched to the extent of the benefits conferred upon them by any judgment valuing the outstanding third-party conservation helium interest any less than they contractually warranted to pay, since a reduction in or release of such liability is

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2. "*terms and prices determined* to be *commensurate* with the fair market value." Sec. 3(a)(2) of the Act (App. pp. A542-543)

equivalent to receipt of a positive, uncompensated benefit. *Olwell v. Nye & Nissen Co.*, 262 Wash. 2d 282, 173 P.2d 652, at 653 (Wash. 1946).

> "The term 'benefit', for purposes of restitution, denotes any form of advantage received, which is capable of having its value measured, and it accordingly includes an advantage of being saved from an expense or loss. Restatement, Restitution, §1, Comment b." *Lawrence Warehouse Co. v. Twohig*, 224 F.2d 493 at 498 (8th Cir. 1955).

The contracts are basically processing agreements, but in order to meet Congressional guidelines and provide for the ultimate determination of the extent and value of third-party interests in helium, to be eventually paid for by the processors themselves, the contracts are couched in terms of purchase and sale of helium, with the government and the processing contractor agreeing among themselves as to their respective obligations to provide funds for the ultimate purchase price to be paid third-parties by the processing contractor. The contracts are still executory as to ultimate price as to all helium removed and delivered.

Accordingly, we look to the price provisions of the contracts to demonstrate landowner Respondents' position that the three processing groups are not aggrieved by the $2.00 per Mcf minimum payments required of them by the court below because the minimum should have been the expanded approximately $3.00 per Mcf third-party beneficiary amount identified, set forth and prescribed as the amount in the written contracts between the government and the processors.

Each processing contract sets forth a beginning per Mcf unit price based upon the amount of helium removed and delivered. In each case this base unit price was

divided by the contracts into two parts. Part 1 of each unit price was nominal in amount and specified all of the cost factors for which it represented compensation.

Part 2 of the initial unit price amounted to substantially all of the total unit price and was to be periodically adjusted in accordance with changes in the wholesale price index during the life of the contract.

Each contract further provided, in another escalation provision, that, in addition to all other payments above mentioned, the government would reimburse each processing company all amounts paid in satisfaction of approved or judicially-determined third-party claims to any interest in the helium, provided that each processing company was required to first pay to such third-parties a specified percentage of Part 2 of the unit price amounting in each instance to the $3.00 figure aforesaid.

These percentages of the Part 2 unit prices, so required to be devoted to satisfaction of third-party claims, were the only costs specifically identified in Part 2 unit prices. Such percentages of Part 2 of the unit prices result in average per Mcf identified amounts as to each processing company as follows during the periods in question:

National	Cities	Northern
$3.12	$3.13	$3.11

The processors have already been paid these respective amounts as part of the base contract prices out of which they are carved. It is these figures that are referred to as the approximate $3.00 amount throughout these proceedings. Whether the percentages of Part 2 unit prices, designated for satisfaction of third-party helium claims, are considered as (1) a payment to the processing companies and their affiliates for the cost of helium if all third-

party claims could be avoided, or (2) as a partial prepayment for helium rights required to be purchased from third parties, or (3) as a payment for the sharing by the helex companies of a contingent liability of indeterminate magnitude, the funds in any case, designated therefor constitute benefits to the helex companies directly attributable to the conservation helium.

If the specified portions of the contract prices assigned to satisfaction of third-party claims are all required to be paid to third-parties by the helex companies (plus any additional amounts required for complete satisfaction of such claims) then the helex companies will have received three definite benefits. They will have (1) satisfied their legally-imposed obligations to third parties, (2) fulfilled their conditional title warranty and indemnification obligations assumed for the benefit of the government in their contracts, and (3) qualified for reimbursement from the government of all third-party helium payments made by them in excess of the specified contract percentages.

On the other hand, if the liability of the processing companies for third-party helium claims were to be limited to amounts less than the designated contract price percentages (approximately $3.00 per Mcf), there are also three specific benefits resulting to the helex companies. As in the first instance, they will again be relieved of third-party claims created by law and will also have satisfied their contractual warranty and indemnification obligations as to unencumbered title to the helium. However, the third benefit changes from a right to receive reimbursement for necessary third-party payments in excess of $3.00 per Mcf to a right to retain that portion of the $3.00 remaining from any valuation of third-party claims less than $3.00 per Mcf, resulting in retention of funds attributable to third-party claims to helium, but free of such claims, and also free

of any further obligation to the government in connection with warranty of title to the helium.

Accordingly, the petitioning Helex Group cannot be aggrieved by the $2.00 floor required by the court below because the minimum should have been the expanded $3.00 per Mcf third-party beneficiary amount agreed to between the Helex Group and the government.

Respectfully submitted,

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APPENDIX

In their petitions, the Helex Group assert that there was no evidence as to the intent of the government and the members of the Helex Group with which it contracted to create third-party beneficiary contracts and that the contracts were intended to inure solely to the benefit of the Helex Group and did not mention any third-party beneficiaries (pp. 7, 17, 19 of the Petition in 81-1920, pp. 10, 15-16, 17 of the Petition in 81-1921); that members of the Helex Group made an unconditional warranty of title to the helium to be delivered to the government (pp. 3, 10 of Petition in 81-1921); that the contractual arrangements between the members of the Helex Group and the government as to payment of third-party claims was a mere indemnification agreement, with the government doing the indemnifying, and was not a price escalation clause for the benefit of third-parties (pp. 3, 7, 9, 9-10 of Petition in 81-1921 and pp. 4, 22, 23 of Petition in 81-1922); that the Helex Group believed they would not be required to pay anybody anything by reason of removal of the helium for delivery to the government by them (p. 16 of Petition in 81-1921); that the contracts between the Helex Group and the government contained a fixed per Mcf amount for helium payment with only a slight cost of living escalation and were not open-ended so as to include payment of helium value to third-parties and that the amount claimed by third-parties exceeded a fund (the amount paid and to be paid by the government to the processors) over which the court had jurisdiction (pp. 3, 7 of Petition in 81-1922, p. 7 of Petition in 81-1920); that the court below created de novo a contract for the benefit of producers and landowners (p. 17 of Petition in 81-1920 and p. 17 of Petition in 81-1921); that no federal

statute creates a contract for the benefit of producers and landowners (p. 18 of Petition in 81-1920) and that the third-party beneficiary issue had never been presented to or considered by the trial court (pp. 13, 20 of Petition in 81-1922).

Such erroneous statements of the Helex Group stem from a complete failure to face up to the nature and exact language of the four conservation contracts between the United States and members of the Helex Group. Likewise ignored are the Helium Amendments of 1960, 74 Stat 918, 50 U.S.C. Sec. 167 et seq. (App. pp. A540-552), herein referred to as the "Act," pursuant to which and under the authority of which the processing contracts were entered into.

Legislation previous to the Act (Section 161, Acts March 3, 1925, c. 426, Sec. 1, 43 Stat. 1110; March 3, 1927, c. 355, 44 Stat. 1387; September 1, 1937, c. 895, 50 Stat. 885, formerly 50 U.S.C. §161), did not grant authority to condemn helium-bearing gas already produced or the rights necessary or incidental to the removal and delivery of helium therefrom, condemnation being limited to lands or interests therein, including leases. Since the conservation program contemplated the acquisition of helium after its removal from its place of deposit in nature, authorization was for the first time granted in the Act to condemn helium, helium-bearing gas, or helium gas mixtures, wherever located, and all other rights necessary or incidental to the acquisition of helium, natural gas or mixture, the Act introducing the unusual concept of specifically authorizing condemnation of all necessary personal property, tangible or intangible, including contract rights, of whatever description, situs or location under law. Secs. 8(a) and 3(a)(2) of the Act (App. pp. A549, 542)

All rights which are to be acquired by the United States under the four contracts[1] entered into between the government and Northern (August 15, 1961, App. pp. 654-659), Cities Service (August 22, 1961, App. pp. A657-659), National Helium (October 13, 1961 App. pp. A613-659), and Phillips (November 13, 1961) are rights which could have been acquired by condemnation under such newly-instituted and unusual condemnation authority, with compensation for the condemnation of the helium or such incidental or necessary rights to be measured by *terms* and *prices* to be *commensurate* with the fair market value. Sec. 3(a)(2) of the Act (App. pp. A542-543). The Secretary of the Interior had the power to acquire by selective, particularized condemnation all rights of every nature, tangible or intangible, which he actually will acquire when the processing contracts are fully carried out as to helium already removed. As indicated by the unusual yardstick of compensation, above quoted, Congress was not content with leaving the measure of required payment to the usually statutorily undefined requirements of "just compensation" under the Constitution. The reasons for the action by Congress in this regard is apparent from the statutory history of the Act.

Congressional intent in this regard is important, even though this is not a condemnation case and the United States is not an indispensible party. This is so because the Secretary of the Interior acted under the Act when

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1. Provisions of the contracts are set out in the Joint Appendix. The contract with Panhandle's processing affiliate, National, petitioner in No. 81-1920, appears at App. A615-653. Parts of the contracts with the Cities Service and Northern Natural affiliates, petitioners in Nos. 81-1922 and 81-1921, are contained in the Joint Appendix (pp. A654-657, A657-659). The Phillips contract is contained in the record in the *Ashland* case. Since the contracts are identical as to matters relevant here, we will make appendix references to the contract with National, Panhandle's processing affiliate.

he entered into the processing contracts, the carrying out of which makes the processors liable for the payment to third-parties of the reasonable value of their interests in helium, including all rights necessary or incidental to its normal delivery and delivery for ultimate beneficial use.

The legislative history of the Act includes officials reports leading up to the Act which reveal that the true value of helium was not known. The testimony of the Interior Department discloses that there was then no such thing as a true competitive market for helium. It is and was undisputed that a government helium monopoly existed in 1960 and before. The Department of the Interior told Congress that helium was then worth about a hundred times as much as natural gas (15 cents v. $15.00); that the proposed conservation program would essentially recognize and fill a market for helium for the future indispensable needs of the people; and that a man should not have his helium taken away from him without receiving full and fair value for it.

Congress was, at the same time, told by the Department of the Interior that the helium would be paid for by the users of helium—the ultimate consumers of helium, with the government participating in a proprietary capacity in a contemplated industrial or commercial enterprise. See Sec. 15 of the Act. (App. p. A552)

Nevertheless, the Department of the Interior strenuously objected throughout the Congressional hearings to the fair value concept (measured by *terms, and prices determined* to be *commensurate* with the fair market value, which was eventually included as Section 3 of the Act (App. pp. A542-543)) over the objections of the Department.

In testifying before the House Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, Under Secretary of the Interior Bennett stated in answer to a question by Congressman Aspinall:

> ". . . This program essentially establishes a market for helium which does not exist today . . . . What we are doing is actually providing a market against the future need for helium. If we dealt with our current, ordinary, everyday requirements for the use of helium . . . we would have no market. What we are doing is *providing a market today* against the needs of the people 25 years from now for helium." (Appendix Ex. Vol. IV, p. 785)

In answer to Congressman Rogers, Mr. Bennett stated:

> "[Mr. Rogers] You would not think a man's property, though, Mr. Bennett, should be taken away from him without him receiving *full and fair value* for it, would you?
>
> "[Mr. Bennett] I think that is correct. The difficulty with the concept, as I mentioned before, as in H.R. 10458, *is use of the word 'market,' where in fact, there is no market.*" (Appendix Ex. Vol. IV, p. 825)

As indicated by Mr. Bennett's testimony, the Department of the Interior objected to the fair market value concept finally included in the Act on the theory that since there was no present market value for helium in fuel streams, no value should be paid because of the demand for future use requiring conservation. The objections of the Department of the Interior to the fair value concept in the absence of any present market for helium in fuel streams, were strenuous and emphatically repeated throughout the hearings, both in the House and later in

the Senate. Congress, nevertheless, included the fair value concept in the Act.

In so doing, it is apparent that the view of Congressman Rogers, from the gas producing areas of Oklahoma, prevailed in Congress, rather than the views of the executive branch. It was Congressman Rogers' Bill (H.R. 10548), referred to by Mr. Bennett in the above-quoted testimony, which introduced the fair value concept in view of the government monopoly and the absence of an existing market for helium in fuel streams. As stated by him about this helium for which there was no present market, but which was to be conserved to apply to the demand for beneficial use in the future under the Helium Act:

> "[Mr. Rogers] You have got, as you well know, *thousands of royalty owners,* who are entitled to have the fair value of the property and that is what it is, it is property, in which they own an interest or in which they own the whole property, in some instances. I think that those people ought to be taken into consideration, too."

Mr. Bennett was reluctantly forced to agree, recognizing at that point that the value to be paid royalty owners would result in additional costs to the Helex Group. His answer was:

> "[Mr. Bennett] I think *they would have to be* because that, of course, would be a cost of doing business, from the point of view of the contractor with whom we dealt." (Appendix Ex. Vol. IV, p. 827)

But the objections of the Department of the Interior, nevertheless, continued before the House Committee and were later urged in the Senate hearings in spite of Mr. Bennett's concession.

The continued opposition of the executive department to the fair value concept is understandable. Without such explicit provisions, the contemplated legislation would not have pinpointed, but would, rather, have left obscure the necessity of paying for third-party interests if landowners were not present during contract negotiations. It had been proposed that helium be acquired under the Act through negotiations merely on terms deemed "reasonable" to the Secretary of the Interior, without any reference to the value of helium. Bills to that effect were supported by the Department of the Interior, as well as pipeline groups. But Congress, in spite of those efforts, substituted the fair value concept in the proposed legislation, with fair value to be the rule not only in condemnation, *but in connection with contracting authority.* This made it clearly necessary for the Secretary of the Interior specifically to provide, in the conservation contracts, for payment of fair value for third-party interests.

Congress so acted after being repeatedly warned that there was no presently established market value for the helium wasted in fuel streams and that the requirements for helium for conservation and separate beneficial use would be reflected in the processing costs, to be passed on to the ultimate users of the helium.

Congress was under no illusions regarding cost and pricing problems, as shown by the above. Neither was it under any illusions regarding how the helium would be paid for. It was to be paid for by users of helium—the ultimate consumers of helium. The Government's unusual role would be that of a participant, in a partnership with business, in an industrial or commercial enterprise. This is further shown by the following exchange between Congressman Kyl and Mr. Bennett:

"[Mr. Kyl] . . . You state that the preliminary calculations indicate a price of $40 or double the present price. Recognizing there is that increase in price likely, what is your opinion as to the immediate effect of this program on the price? As soon as you have implemented this program, what is apt to result in the pricing field?

"[Mr. Bennett] That is a little difficult to pinpoint, but I think we have said from the beginning that as we put these new plants on the line to make possible the extraction of this helium to be stored against future use, it would be our expectation that, at that time, the current *users* of helium should share the cost of making helium available to those *users* at the end of the period and that we would expect the price increase to go into effect by the time we really got well underway with the program."

The possibility of condemnation by the Government and its monopoly permeated pre-amendment transactions. The possibility of condemnation continued to hover over the negotiations under the conservation contracts. Congress recognized that values cannot be established by reference to transactions consummated under threat of eminent domain and in a monopoly market.

A Helex attorney, Mr. Lyle, a former Congressman, testified before the Congressional Committee. He served as chairman of a group of lawyers who had studied the proposed legislation and the problems arising therefrom. He pointed out the "government monopoly" and the lack of a "complete free and competitive market." He suggested the necessary use of a value-less-expense approach because of the absence of sales conducted in a free and competitive market. He testified:

"In the existing situation helium has no market price except the arbitrary price set by the government under its policy of monopoly. Where free markets and competition are absent, it is necessary to consider all elements—*the intrinsic value of helium, the value of helium if extracted by industry and sold on a competitive market, the volume of gas processed, the percentage of helium to the volume of gas processed, the plant investment, the cost of helium production in Government plants, taxes, cost of money, plant operations, profits in unregulated industry, etc.*, all of these are elements that will be considered in arriving at 'terms and at a price commensurate with a fair market price.'"

The Secretary of Interior was authorized, under Section 3(a) of the Act (App. pp. A541-543) to acquire all necessary and incidental rights to obtain the helium for beneficial use (1) through condemnation, (2) through agreement, or (3) by a combination of condemnation and agreement. As a prerequisite to condemnation, however, it was necessary for the Secretary to make two determinations. The first necessary determination was that the national interests required the conservation of certain helium, helium-bearing natural gas, or certain helium-gas mixture. Sec. 3(a)(2)(A) of the Act (App. p. A542) That determination was actually made by him and is recited as a "Whereas" in each of the four agreements. (For example, see App. p. A614)

The second necessary determination was that the Secretary was unable to acquire the rights upon reasonable terms and at the fair market value in the absence of condemnation. Sec. 3(a)(2)(B) of the Act (App. p. A542) The Secretary did not make this determination because he was able eventually to satisfy the Congressional guidelines through most unusual contractual provisions for

the benefit of third-parties, making condemnation unnecessary.

A remarkably interesting aspect of this case is an understanding of just how the Secretary actually succeeded in contracting within the limitations of the Congressional guidelines for the benefit of third-parties. He had some formidable obstacles to overcome, sufficient to challenge the ingenuity of the best lawyers.

In attempting to meet these Congressional guidelines, the Secretary was confronted with two critical matters which had to be dealt with if the contractual method was to be used within the short time available to put the conservation program into effect.

No one then could identify all of the third-parties owning all interests necessary or incidental to recovery of the helium for ultimate beneficial use. How could the Secretary proceed through the contract route without contracting with parties not present and at the same time comply with Congressional directives?

There was a related question: What contractual provisions could be devised in order to assure that proper payment to third-parties would, in fact, be made in the absence of condemnation?

The Secretary devised a sensible, although ingenious, solution to both problems within the specified Congressional guidelines. The Secretary entered into contracts with four companies (or their affiliates) owning large pipelines into which were gathered large quantities of natural gas. It had become known that the pipelines were in accidental possession of helium carried along by the gathered natural gas produced by them or sold to them, which helium had been unwittingly severed from the ground through production from wells located on respon-

dents land in the course of intended oil or gas leasehold operations and that, at a specified point on each pipeline, sufficient helium, so incidentally gathered, was present to make its removal economically feasible for delivery to the government's conservation pipeline.

If reasonable, certain and adequate arrangements could be made in the contracts themselves providing for payments to third-parties owning interests necessary or incidental to such helium recovery for beneficial use, no problems regarding the right to immediate possession would be present. But problems would remain as to the entire bundle of interests constituting unencumbered title. The Secretary solved the problem by including in the contracts themselves arrangements for the eventual purchase and sale of all interests incidental or necessary to the removal of helium delivered into the government pipeline, whether or not owned by the contracting processing company at the time of contracting or delivery, and sensibly included provisions which would make it possible eventually for the processing companies themselves to acquire the unencumbered right to the same by payment to the third-party owners thereof of the required values, and for the processing companies only thereafter to warrant the full unencumbered "title" to the government, upon the government's payment of escalated compensation to the Helex Companies to compensate them, in part, on a per Mcf basis, for their cost of acquiring such outstanding third-party interests.

The contract with National Helex Corporation is typical. It is called a "Contract for the Sale and Purchase of a Helium-Gas Mixture." (App. p. 613) It is still an executory sales contract. Until the required payment by National to third-party owners of all rights necessary or incident to the acquisition of the helium for beneficial use is made National is not in a position to deliver the unen-

cumbered necessary bundle of rights. Nor is National entitled to full payment under the processing agreement until all such interests are required by it for conveyance under the contract. The price provisions still remain executory as to all helium delivered. The price provisions of the contract which make this clear are contained in "ARTICLE VII, PRICE." (App. pp. A623-627)

Paragraph 7.1 of that Article (App. p. A623) provides that the prices paid to the processing company are to be determined by reference to the volumes of helium contained in the inert helium-gas mixture delivered to the United States.

Paragraph 7.2 of the contract (App. p. A623) provides for an initial unit price of $11.78 per Mcf.

Paragraph 7.3 (App. pp. 623-624) provides for certain adjustments in such initial unit price, which initial unit price for purposes of such adjustments, is divided into two parts. Part one, 91 cents, is subject to upward or downward adjustment based upon changes in the purchase price of natural gas paid for by National's affiliate, Panhandle's Eastern Pipeline Company. Part two, the major portion of the initial unit price, is $10.87 and is subject to a "cost of living" adjustment based upon changes in a Bureau of Labor Statistics wholesale price index for all commodities exclusive of farm products and food.

Paragraph 7.4 is an escalation of the initial unit price based upon natural gas regulatory action affecting joint costs and new taxes.

Paragraph 7.5[2] of "ARTICLE VII, PRICE" is an escalation provision providing for a further adjustment in the price. It provides as follows:

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2. This provision is paragraph 7.4 of the Northern Helex and Cities Helex agreements.

"7.5 In addition to all other amounts payable under this contract, Buyer shall pay to Seller all amounts, except as hereinafter provided, that Seller shall pay subsequent to the date of this contract, directly or through an affiliated company to parties other than itself or an affiliated company for the acquisition of helium in the natural gas, as defined herein, or for any interest in such helium. Any such payment to qualify for inclusion hereunder shall be made only with the consent of Buyer; and for the purposes of this paragraph 7.5 Buyer shall be deemed to have consented to any and all such payments in satisfaction or settlement of any claims to helium in the natural gas, as defined herein, or to any interest in such helium that have been judicially determined in favor of any claimants by any Federal court or the highest appellate court of any state. Further, Buyer shall be deemed to have consented to any and all such payments under circumstances similar to any such judicially determined claim if such payments are made generally in accordance with the findings, principles, and conclusions of any such judicial determination. The amounts that Buyer shall be required to pay to Seller in accordance with this paragraph shall not include an amount to be calculated applicable to such acquisition equal to twenty-seven and one-half percent (27.5%) of the weighted average of part two of the unit price or unit prices in effect during the time covered by such acquisition multiplied by the volume in Mcf of helium in the natural gas, as defined herein, covered by such acquisition."

The provision contained in the last sentence of Paragraph 7.5 above quoted, requires, in effect, that National will absorb, out of the package of monetary and other benefits received by it or its affiliates by reason of the con-

tract, the first approximately $3.00 per Mcf of payments to third-party claimants. The total purchase price can be determined only when the amount of required third-party payments are made and paid. Until then, the price provision of the contract remains and will remain indeterminate as to all helium heretofore delivered.

The nature of the contract is such that it requires that the value of the third-party helium interest be separately and independently arrived at in judicial proceedings in the absence of full agreement. Only then can the escalated amount be computed to arrive at the final price to be paid by the government under the processing agreement.

When the sensible arrangements provided by the contract are finally performed, the processing companies and their affiliates will have acquired all rights necessary or incident to the acquisition by the government of the helium, with all related statutory requirements fully satisfied.

The 7.5 provision made it possible to establish an ultimate price to be paid to National in order that the contract could be fully carried out and performed as a "sale and purchase agreement," covering all interests, including interests of third-parties.

The arrangement for payment by the processing companies to third-parties of the value only after judicial determination is significant. Only through such payment will the eventual acquisition by the government of the entire bundle of necessary rights be made possible in the absence of condemnation.

Because of the arrangement, these court proceedings are not eminent domain proceedings, but they do substantially meet Congressional intent. Any other construc-

tion of the Secretary's actions and the contract would be in violation of Section 3 of the Act.

Through the operations of the contract and through court proceedings, the intent that all parties interested be paid by agreement or by *terms* and prices judicially determined to be *commensurate* with fair market value will be achieved.

Pursuant to the contract, each of the processors and the government have agreed on an arrangement, as between themselves, which is satisfactory to both of them under all circumstances.

Neither knew who owned all rights necessary or incident to the acquisition of the helium for beneficial use or the extent of the value to be paid therefore. Both of them recognized that, short of court proceedings or further agreement with third-parties, neither of such issues could be determined. The parties were not in a position to bargain for others as to the extent of their interests or as to such value. But they could make a package arrangement to settle all such issues as between themselves. The relative economic consequences in any event, as between themselves, were all agreed upon and included as part of the package.

As indicated above, the Mcf purchase price under the contracts cannot be ascertained until the value of such third-party interests are determined. The typical 7.5 escalation provision of Article VII (Price) in the National contract with the Secretary was necessary in order to establish the ultimate compensation to be paid to the processor in order that the contract could be fully carried out and eventually performed as a contract providing for the sale and purchase of a helium-gas mixture covering all interests in the helium contained in the delivered mixture, specifically including third-party interests.

In addition, the helex processing company agreed to indemnify and hold the government harmless against "any and all claims of third-parties." This was typically arranged in Section 8.2 of Article VIII (Ownership and Title) of the National contract (App. pp. A627). But the processors' indemnification and hold harmless agreement will not become fully effective until the owners of the third-party interests are fully compensated after judicial determination of their interests and of the amounts to be paid to them in these cases, because this provision related the effective date of the processor's indemnification and hold-harmless agreement to the time of payment by the government to the processor of the escalated amounts required by Sec. 7.5.[3]

The provision in Section 7.5 requires, however, that the government's obligation to make the escalated payments become effective only after the processing company has made such payment ("all amounts . . . that *Seller* shall pay" App. p. A626) to the third-party interests. The Secretary thus assured himself that the upward adjustment in the purchase price—the escalation in the compensation to be paid by the government—would be triggered only upon the processor having already acquired, through payment therefor, the necessary third-party interests for unencumbered delivery to the government through the contract.

In this way, the Secretary was able to arrange for one payment on a per Mcf basis directly to the processor for its services and also for all rights necessary or in-

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3. The section 8.2 language in the Northern (App. p. A654) agreement is in terms of warranty instead of indemnification and hold-harmless, and the reference to the effective date thereof in the Northern, and also in the Cities contract (App. pp. A657-658), is to paragraph 7.4, substantially identical to paragraph 7.5 of the National agreement.

cidental to the acquisition of helium for ultimate beneficial use, including the helium rights to be acquired by the processor from others, in accordance with Congressional guidelines and through contemplated judicial determinations in the absence of third-party agreement.

All economic benefits to the processors are attributable to the contractual arrangement—a particularly practical procedure. That procedure required further dealing with someone other than the contracting parties. The bargained-for consideration to be received by the processor for its services includes a negotiated evaluation and sharing of risks as to both acquisition problems and helium value.

The package typically includes provisions, other than the typical Paragraph 7.5 and 8.2 provisions which recognize third-party claims, such as the termination provisions (see paragraph 12.2(2), App. p. A636) and the typical contingency provision (see paragraph 13.4, App. p. A641) referring to continued operation of the facilities, if purchased by the government after termination, and to a resulting required negotiation for rights in helium needed by the government which National "might own."

It is apparent from the above that, since the contract was designed to provide for the acquisition of all interests, whether then owned by processor or not, the processor was obviously not in a position, at the time of contracting, to warrant title to the entire bundle of rights necessary or incidental to the acquisition of the conservation helium to be delivered to the government. Bu[illegible] would be able to do so after third-party claims consti[illegible]uting encumbrances were determined and paid for. To meet this problem, the parties arranged that the processor's indemnification and hold-harmless or title warranty agreements would not be fully effective until all such necessary rights

and interests had been identified, determined and paid for and that, when such determination and payment was made, and only then, would the processor's indemnification or warranty of title be in full force and effect.

Paragraph 12.2(2) (App. pp. A636-637) of the National agreement typically provides that the processor may terminate the agreement if a third-party claim adverse to its interest is validated by court order, but only if the processor is unable to obtain such third-party interest with the consent of the government to make the escalated payment to it under the typical Paragraph 7.5 of the National Agreement.

As indicated above, the full impact of the third-party beneficiary aspect of the contract is driven home upon examination of Paragraph 8.2 of Article VIII "Ownership and Title" of the typical National Agreement. (App. p. A627)

Under this provision, the Helex company agrees to indemnify and save the government harmless from "any and all claims of third-parties." As above also indicated, such indemnification and hold-harmless agreement or title warranty is subject, however, to the agreement of the government to make certain payments to the Helex company under Paragraph 7.5, with the Helex company agreeing to document its rights, titles and interest. This peculiar contractual provision thus relates the effective date of the processor's indemnification or warranty to the time of payment for third-party interests.

The obligation of the government "to make certain payments" arises only after required payments to third-parties have already been made by the processors for the acquisition of the necessary third-party interests. The Secretary was thus assured that the upward adjustment

of the purchase price to be paid by the government by reason of the acquisition of third-party interests was to be triggered only upon acquisition by the processor, through payment therefor, of necessary outstanding interests.

Under Paragraph 8.2, the processor now also became assured that its warranty of title would not attach until the government had paid to the processor the escalated purchase price.

Through the efforts of the Secretary, the substantial equivalent of Congressional intent will be achieved, with landowners, lessee-producers, the processing companies and their affiliates all being included as a part of the "individual enterprise" which Congress stated it was in the national interest to foster. (See Sec. 15 of the Act, App. p. A552)

As a result, conservation of helium has now been achieved. But the payment necessary for the acquisition of the entire bundle of rights constituting unencumbered title has not yet been achieved and the entire price to be paid to the processors has not yet been determined, since it will include payment for that part of the bundle attributable to third-party interests.

It is fully apparent that the wellhead value of helium cannot be determined by reference to the base prices set forth in the processing agreements and already paid to the processor, since a separate and independent determination of the value of third-party interests is provided for, which, when determined, will become, to an agreed-upon extent, a part of the entire amount of "money paid and to be paid by the United States to the interpleading plaintiffs", constituting the interpleaded fund. (App. p. A137)